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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELDON S. REED, Petitioner,

v.

VICTORIA C. DRUMMOND, TRUSTEE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the phrase "applicable non-bankruptcy law" found in 11 U.S.C. § 541(c)(2) is to be read so as to include a restriction on the transfer of a beneficial interest of a debtor in a trust that is enforceable under federal law?

LIST OF PARTIES

The parties are the Petitioner, Eldon S. Reed, a debtor in bankruptcy, and Respondent, Mark Hashimoto, the successor Trustee to Trustee Victoria C. Drummond.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Mark Hashimoto, successor Trustee to Respondent Victoria C. Drummond by Notice of Appointment by the United States Trustee for the District of Arizona dated June 30, 1992, respectfully submits his Brief in Opposition to Petitioner Eldon S. Reed's Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on December 11, 1991. The Petition for Rehearing was denied on April 2, 1992.

STATUTES INVOLVED

1. 11 U.S.C. § 541, which is reprinted in the Appendix to the Petition for Writ of Certiorari by Petitioner Eldon S. Reed.

2. 11 U.S.C. § 522(b)(2)(A), which provides:

> (b) Notwithstandingsection 541 of this title, an individual debtor may exempt from property of the estate property listed in either paragraph (1) or, in the alternative paragraph (2) of this subsection. . . .
>
> * * *
>
> (2)(A) Any property that is exempt under Federal law, other than subsection (d) of this section. . . .

3. 11 U.S.C. § 522(d)(10)(E), which provides:

> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> * * *
>
> (A) A payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. . . .

REASONS FOR DENYING THE WRIT

Patterson v. Shumate, ___ U.S. ___, 112 S.Ct. 2242 (1992), decided on June 15, 1992 by this Court, was incorrectly decided and should be disregarded or overruled; thus, the Ninth Circuit opinion in this case should not be reversed on the basis of Patterson v. Shumate nor should the Petition for Certiorari be granted on the basis of Patterson v. Shumate.

This Court, in Patterson v. Shumate, stated that the plain language of the Bankruptcy Code is the Court's determinate. Yet the "plain language" interpretation by this Court of 11 U.S.C. § 541(c)(2) renders meaningless the "plain language" of 11 U.S.C. § 522. Section 522 of the Bankruptcy Code exempts both social security benefits and civil service retirement benefits.

Section 522(d)(10), for example, lists exemptions for "the debtor's rights to receive" social security benefits. Social security benefits, like ERISA benefits, are under the protection of a federal anti-alienation clause found at 42 U.S.C. § 407(a):

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity . . .

The anti-alienation description found in the Social Security Act is similar to that found in ERISA.

Civil service retirement benefits are subject to an anti-alienation provision in 5 U.S.C. § 8346.

Like ERISA, both social security and civil service retirement benefits are distributed from trusts. See 42 U.S.C. §§ 401(a)(b), 1395(i); 5 U.S.C. § 8348.

Section 522(b)(2)(A) provides an exemption for:

> Any property that is exempt under federal law, other than subsection (d) of this section.

11 U.S.C. § 522(b)(2)(A). The legislative history to that section further reads:

> Subsection (b) tracks current law. It permits a debtor the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. Some of the items that may be exempted under Federal laws other than title 11 include:
>
> * * *
>
> Social security payments, 42 U.S.C. 407
>
> * * *
>
> Civil service retirement benefits, 5 U.S.C. 729, 2265

S. Rep. No. 989, 95th Cong., 2d Sess. 75-76 (1978).

If Congress had intended to exclude social security benefits and civil service retirement benefits because of their restraints on alienation under Section 541(c)(2), there would be no need whatsoever to exempt social security benefits or civil service benefits under Section 522.

This Court, in construing Section 541(c)(2) broadly, has rendered portions of Section 522 meaningless. Yet it cannot be assumed that Congress passed meaningless legislation. Section 522 must be construed to have meaning. See Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); Jackson v. Kelly, 557 F.2d 735, 740 (10th Cir. 1977) (court should not suppose that Congress intended to enact unnecessary statutes).

As this Court has recently -- and historically -- observed:

> Of course, the 'starting point in every case involving construction of a statute is the language itself.' Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J.,

> concurring). But the text is only the starting point. As JUSTICE O'CONNOR explained last Term, ""in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."" Offshore Logistics, Inc. v. Tallentire, 477 U.S. ___, ___, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956) (quoting United States v. Heirs of Boisdoré, 8 How. 113, 122, 12 L.Ed. 1009 (1849))).

Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 358, 93 L.Ed.2d 216 (1986).

Statutes should be interpreted so as to not render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979) ("Appellants' argument that 'may be viable' is synonymous with 'viable' would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.") Yet, the Court in Patterson v. Shumate violated that elementary canon of construction. This canon is not new. Market Co. v. Hoffman, 101 U.S. 112, 25 L.Ed. 782 (1879) (the Supreme Court may not construe a statute so as to deny effect to any part of its language).

As commentators have observed, the "plain language" doctrine creates more confusion than it resolves and results in an abdication by the Court to pursue justice.

> With so many bankruptcy-related cases before it in one term, the Supreme Court had an opportunity to have an enormous impact on bankruptcy law. Despite this opportunity, the decisions were disappointing. Rather than formulate a coherent theory of the interrelated policies and purposes of the Bankruptcy Code, the Court adopted the application of various rules of statutory construction as its govern-

ing bankruptcy jurisprudence. It decided these cases on the narrowest of grounds, and as a result, with several of these issues, the Court created more confusion than it resolved.

* * *

[T]he 'plain language' doctrine is more than simply a rule of statutory construction. At least for Justice Scalia, and possibly other less forthright Justices, reliance on the 'plain language' doctrine and other rules of statutory construction derive from a narrow view of the role of courts. When viewed from this perspective, courts interpret law, while legislators make it. The role of the courts is merely that of a super-grammarian. The pursuit of equity, justice and fairness appear outside the scope of acceptable judicial activities. These laudable goals are for legislatures to pursue. In this jurisprudential scheme, there is no such thing as a judicial exception because only Congress has the authority to make law. Indeed, precedent itself would appear to be unimportant except as an indication of courts' interpretations of a particular statutory provision. Where there is a statute, there can be no common law. I am generally troubled by this juridical vision of the limited role of courts, but especially troubled by this view as applied to bankruptcy law where, after all, Bankruptcy Courts are expressly empowered to act as courts of equity. 11 U.S.C. § 105(a).

* * *

The Court's 'one-subsection-at-a-time approach' is more than merely an inefficient method of statutory interpretation, however. With this 'one-subsection-at-a-time' approach the Court is just deciding cases, and not getting down to the harder task of establishing general principles of bankruptcy law for itself, the lower courts and the litigants who appear

> before them. The Supreme Court, more than any other court, should develop and identify a coherent theory of bankruptcy law. See Dick v. New York Life Ins. Co., 359 US 437, 453-54, 3 L Ed 2d 935, 79 S Ct 921 (1959) (Frankfurter, dissenting) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.") (quoting Taft, "The Jurisdiction of the Supreme Court Under the Act of February 13, 1925," 35 Yale LJ 1, 2 (1925)). Identifying and articulating the policies and purposes of the Bankruptcy Code would not usurp a legislative function. Declining to discuss these policies may amount to a shirking of its own judicial functions, through.

Susan Block-Lieb, Bankruptcy Decisions of the Supreme Court of the United States During the 1991-1992 Term, 8 Norton Bankr. L. Advisor, August, 1992, at 1, 4, 7. See Burlingham v. Crouse, 228 U.S. 459, 473, 33 S.Ct. 564, 57 L.Ed. 920 (1913) ("[i]t is the two-fold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.").

The Court in Patterson v. Shumate rejected the Trustee's argument that legislative history expressed Congress' intent on whether ERISA-qualified pension plans were considered property of the bankruptcy estate. Yet, this Court has previously observed that the House and Senate reports on the Bankruptcy Code indicated that the property included within a bankruptcy estate included that which was included under the Bankruptcy Act, which only excluded beneficial interests under state law spendthrift trusts.

> The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of

> property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." H.R.Rep. No. 95-595, p. 367 (1977); S.Rep. No. 95-989, p. 82 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5868, 6323.

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 2313 n. 9, 76 L.Ed.2d 515 (1983). Contrary to this Court's earlier pronouncements that Congress intended to not only include that which was an asset of a bankruptcy estate under the Bankruptcy Act but include more, this Court in Patterson v. Shumate narrowed the scope of what is to be included in the bankruptcy estate.

The Court also rejected in Patterson v. Shumate the argument that the Court's construction of Section 541(c)(2) rendered Section 522(b)(10)(A) superfluous. The Court noted that pension plans established by governmental entities and churches need not comply with subchapter 1 of ERISA which included the anti-alienation requirement. What the Court's ruling does in effect is to say Congress intended with regard to government and church ERISA-qualified plans that only the amounts reasonably necessary for the support of the debtor and the dependent of the debtor would be exempt, but that amounts wholly unnecessary for the support of the debtor in all other ERISA-qualified plans would be excluded in a bankruptcy case. Such a construction makes Congress appear nonsensical. What reason would Congress have to allow a debtor with benefits under an ERISA-qualified government or church plan keep from creditors only those amounts necessary for the debtor's and debtor's dependents' support but allow debtors with benefits under all other ERISA-qualified plans to keep unlimited amounts —— in one instance a debtor having over $2 million in multiple ERISA-qualified pension plans and who makes over $500,000 a year and who placed $500,000 into one of the ERISA-qualified pension plans within five months of his bankruptcy.

CONCLUSION

As discussed above, Respondent requests that this Court deny Petitioner Reed's Petition for Writ of Certiorari because the Court's decision in Patterson v. Shumate violates elementary canons of construction rendering other provisions of the Bankruptcy Code both meaningless and nonsensical, and produces inequitable results.

Respectfully submitted,

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September 11, 1992